

EXHIBIT 2

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4
5 IN THE UNITED STATES DISTRICT COURT
6 FOR THE NORTHERN DISTRICT OF CALIFORNIA
7

8 CALIFORNIA PUBLIC EMPLOYEES
9 RETIREMENT SYSTEM,

10 Plaintiff,

v.

11 MOODY'S CORP., *et al.*,

12 Defendants.
13

No. C 09-03628 SI
Related Case No. C 09-03629 JCS

**ORDER GRANTING PLAINTIFF'S
MOTION TO REMAND**

14 Plaintiff has filed a motion to remand this action to San Francisco County Superior Court. The
15 motion is scheduled for hearing on November 13, 2009. Pursuant to Civil Local Rule 7-1(b), the Court
16 finds this matter appropriate for resolution without oral argument and VACATES the hearing. Having
17 considered the papers submitted, and for good cause shown, the Court hereby GRANTS plaintiff's
18 motion and remands this case. The Case Management Conference scheduled for November 13, 2009
19 is VACATED.
20

21 **BACKGROUND**

22 Plaintiff California Public Employees' Retirement System ("CalPERS") administers retirement,
23 health, and financial benefits for more than 1.6 million California public employees, retirees, and their
24 families. Biderman Decl., Ex. B [Docket No. 49-2]. It is the nation's largest public pension fund with
25 approximately \$200 billion in market assets. *Id.* CalPERS was created by, and is governed according
26 to, the California State Constitution and California Government Code. Cal. Const. art. XVI, § 17; Cal.
27 Gov't Code §§ 20000, *et seq.* It is considered a unit of the California State and Consumer Services
28 Agency. Cal. Gov't Code § 20002.

1 Plaintiff filed this lawsuit on July 9, 2009 in San Francisco County Superior Court, alleging that
2 defendant credit rating agencies negligently gave their highest investment grade rating to three
3 Structured Investment Vehicles (“SIVs”). Complaint ¶ 1. In 2006, Plaintiff invested \$1.3 billion in
4 short-term debt securities issued by these SIVs. The three SIVs collapsed in 2007 and 2008 and plaintiff
5 alleges that it suffered investment losses of hundreds of millions, and possibly more than one billion,
6 dollars as a result. The complaint asserts common law and state statutory claims for negligent
7 misrepresentation and negligent interference with prospective economic advantage. *Id.* ¶ 118-138.

8 On August 7, 2009, defendants Moody’s Corp., Moody’s Investors Service, Inc. (collectively
9 “Moody’s”), The McGraw-Hill Companies, Inc. (“McGraw-Hill”), and Fitch, Inc., Fitch Group, Inc.,
10 and Fitch Ratings, Ltd. (collectively “Fitch”) removed the case to this Court, asserting diversity
11 jurisdiction under 28 U.S.C. § 1332(a). Fitch individually filed a second notice of removal asserting
12 original jurisdiction pursuant to the Class Action Fairness Act of 2005, 28 U.S.C. §§ 1332(d), 1453
13 (“CAFA”).¹

14 15 LEGAL STANDARD

16 A suit filed in state court may be removed to federal court if the federal court would have had
17 original subject matter jurisdiction over that suit. 28 U.S.C. § 1441(a); *Snow v. Ford Motor Co.*, 561
18 F.2d 787, 789 (9th Cir. 1977). The bases for federal subject-matter jurisdiction are: (1) federal question
19 jurisdiction under 28 U.S.C. § 1331 and (2) diversity of citizenship jurisdiction under 28 U.S.C. § 1332.
20 The removal statute is strictly construed against removal jurisdiction, and doubt is resolved in favor of
21 remand. *Libhart v. Santa Monica Dairy Co.*, 592 F.2d 1062, 1064 (9th Cir. 1979).

22 A motion to remand is the proper procedure for challenging removal. Remand to state court may
23 be ordered either for lack of subject matter jurisdiction or for any defect in removal procedure. *See* 28

24
25 ¹Both notices of removal seek to remove the same underlying case. The first notice of removal
26 was filed on behalf of all the defendants and assigned to this Court as Case No. 09-03628. Fitch’s
27 second notice of removal opened a second federal case based on the same state court action and was
28 originally assigned to the Honorable Joseph C. Spero as Case No. 09-03629. Defendants subsequently
moved to relate the two notices of removal and plaintiff responded in support of the motion. [Case No.
09-03628, Docket Nos. 6-7]. This Court issued an order relating the two cases on September 10, 2009.
[Docket No. 15]. Plaintiff now makes a consolidated motion to remand, addressing both notices of
removal.

1 U.S.C. § 1447(c). The court may remand sua sponte or on motion of a party, and the parties who
2 invoked the federal court's removal jurisdiction have the burden of establishing federal jurisdiction. *See*
3 *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1195 (9th Cir. 1988) (citing *Wilson v. Republic Iron &*
4 *Steel Co.*, 257 U.S. 92, 97 (1921)).

6 DISCUSSION

7 Plaintiff moves to remand this action to state court, where it was initially filed. Plaintiff argues
8 that it is an arm of the State of California and therefore not a citizen for diversity purposes. Defendants
9 contend that this Court has diversity jurisdiction over the matter under 28 U.S.C. § 1332 because
10 plaintiff is not an arm of the state, but rather a citizen of the State of California. Alternatively, defendant
11 Fitch contends that this Court may exercise removal jurisdiction pursuant to CAFA. The Court will
12 address both of these arguments.

14 I. Diversity Jurisdiction

15 In order to establish federal diversity jurisdiction, a party seeking removal must show that a
16 dispute has arisen between citizens of different states and that the sum or value in controversy exceeds
17 \$ 75,000. 28 U.S.C. § 1332. Both parties agree that the statutory amount in controversy requirement
18 is satisfied and that defendants are not citizens of California. The only dispute is whether CalPERS is
19 a citizen of the State of California for purposes of diversity jurisdiction.

20 To determine whether diversity jurisdiction exists, the Court must look to the citizenship of the
21 real parties to the controversy, not the citizenship of nominal or formal parties. *Navarro Sav. Ass'n v.*
22 *Lee*, 446 U.S. 458, 460-461 (1980). “[A] state is not a ‘citizen’ for purposes of diversity jurisdiction.”
23 *Moor v. Alameda County*, 411 U.S. 693, 717 (1973) (citing *Postal Tel. Cable Co. v. Alabama*, 155 U.S.
24 482, 487 (1894)). However, “a political subdivision of a State, unless it is simply ‘the arm or alter ego
25 of the State,’ is a citizen of the state for diversity purposes.” *Id.* The underlying question the Court
26 must ask is whether the State is the real party in interest. *See State Highway Com. v. Utah Constr. Co.*,
27 278 U.S. 194 (1929); *see also Fowler v. Cal. Toll-Bridge Auth.*, 128 F.2d 549, 550 (9th Cir. 1942). If
28 so, this Court is without diversity jurisdiction. *Id.*

1 In making this determination, several courts have looked to the standards announced in Eleventh
2 Amendment cases addressing whether public entities are entitled to sovereign immunity as an arm of
3 the state. *See Md. Stadium Auth. v. Ellerbe Becket Inc.*, 407 F.3d 255, 260-61 (4th Cir. 2005) (holding
4 that Eleventh Amendment immunity test is applicable to diversity jurisdiction analysis); *Univ. of South*
5 *Ala. v. Am. Tobacco Co.*, 168 F.3d 405, 412 (11th Cir. 1999) (same); *Tradigrain, Inc. v. Miss. State Port*
6 *Auth.*, 701 F.2d 1131, 1132 (5th Cir. 1983) (find that the analysis of an agency's status for purposes of
7 the Eleventh Amendment and diversity jurisdiction are "virtually identical"); *cf. Univ. of R.I. v. A. W.*
8 *Chesterton Co.*, 2 F.3d 1200, 1202-03 n.4 (1st Cir. 1993) (rejecting two proposed distinctions between
9 the immunity and diversity tests). The Ninth Circuit has not directly ruled on the question of whether
10 the factors used in an Eleventh Amendment immunity analysis should be used to determine whether an
11 entity is an arm of the state for diversity purposes. *See Befitel v. Global Horizons, Inc.*, 461 F. Supp.
12 2d 1218, 1221 (D. Haw. 2006). However, it has recognized that "a similar rule controls the
13 determination of diversity jurisdiction [and Eleventh Amendment immunity] when individual state
14 officers or agencies are named in lieu of the state." *Ronwin v. Shapiro*, 657 F.2d 1071, 1073 (9th Cir.
15 1981). Consequently, both parties agree that Eleventh Amendment factors should inform the diversity
16 analysis in the instant case.

17 The Ninth Circuit examines five factors to determine whether an entity is an arm of the state for
18 purposes of sovereign immunity: "[1] whether a money judgment would be satisfied out of state funds,
19 [2] whether the entity performs central governmental functions, [3] whether the entity may sue or be
20 sued, [4] whether the entity has the power to take property in its own name or only the name of the state,
21 and [5] the corporate status of the entity." *Mitchell v. Los Angeles Cmty. Coll. Dist.*, 861 F.2d 198, 201
22 (9th Cir. 1988).

23
24 **A. State's financial interest**

25 The first *Mitchell* factor considers whether monetary relief would be paid out of state funds.
26 This prong contemplates a sovereign immunity case, where the public entity is sued as a defendant in
27 federal court. This specific issue does not arise in diversity cases where, as here, the state-related entity
28 is the plaintiff. However, the analysis centers on whether the state has any financial interest in the

1 litigation or in the affairs of the state agency. *See Fowler v. Cal. Toll-Bridge Auth.*, 128 F.2d 549 (9th
2 Cir. 1942); *see also DeLong Corp. v. Or. State Highway Comm'n.*, 343 F.2d 911 (9th Cir.). Therefore,
3 the relevant question in this case is whether a money judgment for CalPERS would benefit the
4 California Treasury.

5 Defendants contend that recovery in this action will not impact the treasury because the State's
6 Constitution and statutory scheme specify that CalPERS funds are restricted for use by CalPERS for the
7 system's beneficiaries. *See* Cal. Const. art. 16, § 17(a) ("The assets of a public pension or retirement
8 system are trust funds and shall be held for the exclusive purposes of providing benefits to participants
9 in the pension or retirement system and their beneficiaries and defraying reasonable expenses of
10 administering the system."); Cal. Gov't. Code § 20176 ("Notwithstanding any other provision of law,
11 no funds in the retirement fund shall be expended for any purpose other than the cost of administration
12 of this system, investments for the benefit of this system, the reduction of employer contributions, and
13 the provision of benefits to the members and retired members of this system and their survivors and
14 beneficiaries."). The Government Code also requires CalPERS' administrative expenses to be paid from
15 funds appropriated as interest income from the retirement fund. *See* Cal. Gov't. Code § 20173.
16 Defendants argue that the fact that these administrative expenditures are not made using state funds
17 weighs against a finding that CalPERS is an arm of the state.

18 However, the State has substantial fiscal obligations to CalPERS. The State has a statutorily
19 created contractual obligation to contribute to CalPERS' fund in order to provide employees' vested
20 rights to pension benefits. *Bd. of Admin. v. Wilson*, 61 Cal. Rptr. 2d 207, 223 (Cal. Ct. App. 1997);
21 *Valdes v. Cory*, 189 Cal. Rptr. 212, 223 (Cal. Ct. App. 1983). If CalPERS cannot meet its payment
22 obligations, the State is required to pay for any shortfall in its funding. *Westly v. Bd. of Admin.*, 130 Cal.
23 Rptr. 2d 149, 165 (Cal. Ct. App. 2003) ("[I]f the CalPERS fund is insufficient to pay the benefits owed
24 to state employees, the state is obligated to pay the money to pensioners from other sources.").
25 California law provides that contributions to the retirement system be appropriated annually from the
26 State Treasury's General Fund and quarterly from other State Treasury funds. Cal. Gov't Code §§
27 20822, 20824. Therefore, plaintiff contends that a monetary recovery by CalPERS in this action will
28 alleviate this obligation to the extent any shortfall is experienced.

1 The Court is persuaded that CalPERS' financial identity is not completely autonomous from the
2 State. The State's continuing obligation to pay vested benefits to the beneficiaries suggests that the
3 California Treasury may well stand to benefit from a money judgment in favor of CalPERS. Further,
4 although the CalPERS fund is not commingled with general state funds, it constitutes a trust fund within
5 the state treasury and is managed by various state actors, including elected officers and appointed
6 government leaders. Cal. Gov't Code §§ 20170, 20177, 20120, 20090, 20096, 20096.5. For these
7 reasons, the Court concludes that this factor weighs slightly in favor of construing CalPERS to be an
8 arm of the state.

9
10 **B. Central government function**

11 CalPERS' stated purpose is "to effect economy and efficiency in the public service by providing
12 a means whereby employees who become superannuated or otherwise incapacitated may, without
13 hardship or prejudice, be replaced by more capable employees, and to that end provide a retirement
14 system consisting of retirement compensation and death benefits." Cal. Gov't Code § 20001. The
15 California Supreme Court has observed that the system "serve[s] two objectives: to induce persons to
16 enter and continue in public service, and to provide subsistence for disabled or retired employees and
17 their dependents." *Wheeler v. Bd. of Admin. of Pub. Employees' Ret. Sys.*, 601 P.2d 568, 570 (Cal.
18 1979) (internal quotation marks and citation omitted). Defendant's contention that CalPERS merely
19 serves a proprietary function is unpersuasive in light of these broader objectives.

20 Defendants also argue that the fact that CalPERS serves non-state employees of local school
21 districts and other public agencies indicates that it does not perform an inherently central government
22 function. The Second Circuit rejected this argument in holding that the retirement system at issue in
23 that case was an arm of the state. *McGinty v. New York*, 251 F.3d 84, 98 (2d Cir. 2001). The court
24 found that "[a]lthough the Retirement System does not service state employees exclusively, it assists
25 in the business of the state by enabling the state to meet its pension and benefits obligations." *Id.* The
26 Court is persuaded by this reasoning. The fact that CalPERS serves other agencies does not render it
27 an entity separate from the state. In fact, as plaintiff points out, the broad coverage provided by
28 CalPERS tends to show that it performs a central government service because it addresses "matter[s]

1 of statewide rather than local or municipal concern.” *Beentjes v. Placer County Air Pollution Control*
2 *Dist.*, 397 F.3d 775, 782 (9th Cir. 2005).

3 Defendants further contend that the enactment of Proposition 162 provides CalPERS with
4 substantial autonomy from the state, thereby indicating that the state does not “exercise[] centralized
5 government control over the entity.” *Id.* at 782. Proposition 162, known as the “California Pension
6 Protection Act of 1992,” amended the State Constitution “[t]o give the sole and exclusive power over
7 the management and investment of public pension funds to the retirement boards elected or appointed
8 for that purpose, to strictly limit the Legislature’s power over such funds, and to prohibit the Governor
9 or any executive or legislative body of any political subdivision of this state from tampering with public
10 pension funds.” California Pension Protection Act of 1992, § 3(e). It also affirmed the principle that
11 the retirement board’s fiduciary “duty to its participants and their beneficiaries shall take precedence
12 over any other duty.” Cal. Const. art 16, § 17(b); *see also* California Pension Protection Act of 1992,
13 § 3(g). This was intended to provide CalPERS with a degree of autonomy from the State in order to
14 facilitate the execution of its fiduciary duties without interference. As the California Senate Office of
15 Research explained, the Act “would have the effect of removing retirement systems within the hierarchy
16 of particular agencies, eliminating most (if not all) of the powers of oversight and the limited, related
17 degree of control that the creating/authorizing bodies currently hold.” Biderman Decl., ex. R, p. 19
18 [Docket No. 49-18].

19 However, plaintiff asserts that California courts have indicated that the plenary authority that
20 Proposition 162 purportedly gave the retirement board is not without limits. In *Westly v. Board of*
21 *Administration*, 130 Cal. Rptr. 2d 149, the State Controller brought suit challenging certain actions the
22 CalPERS Board had taken pursuant to its plenary authority under Proposition 162. Specifically, the
23 Board had 1) exempted at least 10 portfolio managers from civil service, 2) issued its own warrants for
24 the pay of its portfolio managers, 3) increased the compensation of the Board members, and 4) adopted
25 an expense reimbursement policy that exceeded limits under state law. *Id.* at 156-57. The Controller
26 claimed that Proposition 162 did not give the Board the authority to take these actions in violation of
27 state laws. *Id.* at 153. The trial court agreed, finding that “the voters had intended to stop the raiding
28 of the pension funds, not grant [CalPERS] unlimited authority to ignore state laws governing state

employees.” *Id.* at 156 (internal quotation marks omitted). The California Court of Appeal affirmed, concluding that:

[W]ith regard to administration of the system, the Board’s authority is limited to actuarial services and to the protection and delivery of the assets, benefits, and services for which the Board has a fiduciary responsibility. No such power is given over the administration of the matters at issue here.

Id. at 161. The Court of Appeal clarified that while Proposition 162 gave the Board the power to administer the investments and payments of CalPERS, this administrative authority does not extend to compensation of the Board and its employees. *Id.* at 162.

On balance, the Court concludes that the second factor weights slightly in favor of finding that CalPERS is an arm of the state. Although CalPERS enjoys considerable autonomy since the enactment of Proposition 162, it is not substantially independent of State control in all its affairs. CalPERS’ “plenary authority” is limited to the investment and payment of benefits and does not extend to all administrative matters. *Id.* at 161. Further, even within the realm of investments and benefits, the State retains a degree of control, including the power to reduce or eliminate pension benefits not already vested as well as the power to prohibit certain investments if it is in the public interest. Biderman Decl, ex. R, p. 19-20. Additionally, as discussed above, CalPERS’ stated objectives as well as its broad coverage indicate that CalPERS addresses a matter of statewide concern. These factors collectively demonstrate that CalPERS serves a central government function.

C. Other Mitchell Factors

Plaintiff concedes that CalPERS has the right to sue and be sued. However, plaintiff notes that many entities that can sue and be sued in their own names have been held to be arms of the state. *See Belanger v. Madera Unified School Dist.*, 963 F.2d 248, 254 (9th Cir. 1992); *Regents of the Univ. of Cal. v. Indem. Ins. Co. of N. Am.*, No. C 07-02721, 2007 U.S. Dist. LEXIS 587000 (N.D. Cal. Aug. 3, 2007); *Dep’t of Fair Employment & Hous. v. Lucent Techs., Inc.*, No. C 07-3747, 2007 U.S. Dist. LEXIS 77360, at *3 (N.D. Cal. Oct. 9, 2007) Nonetheless, although this factor is not dispositive, it weighs against finding that CalPERS is an arm of the state.

The parties also do not dispute that CalPERS has the power to take property in its own name.

1 It is explicitly authorized to make investments and sell any security, obligation, or property incidental
2 to those investments. *See* Cal. Gov't Code § 20191.²

3 The weight of all the factors identified by the Ninth Circuit in *Mitchell* leads this Court to
4 conclude that CalPERS is an arm of the state and therefore not a citizen of California for purposes of
5 federal diversity jurisdiction. Although CalPERS may sue and be sued in its own name, and take
6 property in its own name, the State has a financial interest in CalPERS' affairs, and it performs a central
7 government function. Furthermore, the Court reiterates that the removal statute is strictly construed
8 against removal jurisdiction, and doubt is resolved in favor of remand to the state court. *Libhart*, 592
9 F.2d at 1064.

10 Additionally, as plaintiff points out, previous cases addressing this issue have found that
11 CalPERS is an arm of the state. *See Cal. Pub. Employees' Ret. Sys. v. Stride Rite Children's Group*, No.
12 96-6558, slip op. (S.D. Fla. Dec. 3, 1996) (holding that CalPERS is an arm of the state for purposes of
13 diversity); *Retired Pub. Employees' Ass'n, Chapter 22 v. California*, 614 F. Supp. 571, 581 (N.D. Cal.
14 1984) (finding that the Eleventh Amendment precluded federal jurisdiction to hear "a pendant state
15 claim against the state and state officials and agencies" because the defendants, including CalPERS,
16 were immune from suit).

17 In sum, this Court lacks diversity jurisdiction because the parties are not citizens of different
18 states.

19 20 **II. Class Action Fairness Act**

21 Alternatively, Fitch invokes this Court's removal jurisdiction pursuant to 28 U.S.C. § 1332(d)
22 on the ground that CalPERS' lawsuit constitutes a removable "mass action." The Class Action Fairness
23 Act of 2005 ("CAFA") extends federal removal jurisdiction to class actions as well as certain civil suits,
24 defined as "mass actions." *Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 952 (9th Cir. 2009). The "term
25 'mass action' means any civil action in which monetary relief claims of 100 or more persons are
26 proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law

27
28 ²Defendants do not contend that CalPERS has corporate status pursuant to the last prong of the
Mitchell test.

1 or fact.” 28 U.S.C. 1332(d)(11)(B)(i) (internal parenthetical omitted). A “qualifying mass action ‘shall
2 be deemed to be a class action’ removable to federal court under the Act, so long as the rest of CAFA’s
3 jurisdictional requirements are met.” *Tanoh*, 561 F.3d at 952 (quoting 28 U.S.C. § 1332(d)(11)(A)).
4 These requirements include (1) that the aggregate amount in controversy exceed \$5,000,000, exclusive
5 of interest and costs, (2) minimal diversity, meaning that at least one plaintiff must be a citizen of a state
6 or foreign state different from that of any defendant, and (3) that plaintiffs’ individual claims satisfy the
7 \$75,000 jurisdictional amount in controversy requirement for federal diversity jurisdiction. *See id.* The
8 proponent of federal jurisdiction has the burden of establishing removal jurisdiction under CAFA.
9 *Abrego v. Dow Chem. Co.*, 443 F.3d 676, 685 (9th Cir. 2006).

10 The threshold inquiry is whether or not the instant action involves monetary relief claims of 100
11 or more persons. Defendants argue that this requirement is met because CalPERS brought suit on behalf
12 of its beneficiaries, comprising more than 1.6 million California public employees, retirees, and their
13 families. A similar argument was raised in *Kitazato v. Black Diamond Hospitality Investments*, No.
14 09-00271, 2009 U.S. Dist. LEXIS 92927, at *10 (D. Haw. Oct. 5, 2009), wherein defendants argued that
15 CAFA’s numerosity requirement was met because one of the plaintiffs, an unincorporated association,
16 was comprised of and purported to represent approximately 490 co-owners of a resort. The court
17 rejected this argument, stating that “mass actions simply concern the direct claims of individual
18 plaintiffs without regard to any ‘putative plaintiff class,’ as is typical in a class action.” *Id.* at *18.
19 Indeed, the Ninth Circuit has recognized that “plaintiffs in a mass action, unlike in a class action, do not
20 seek to represent the interests of parties not before the court.” *Tanoh*, 561 F.3d at 952; *see also* Senate
21 Judiciary Committee Report for CAFA. Moreover, the Senate Committee Report for CAFA defines
22 “mass actions” as “suits that are brought on behalf of numerous *named plaintiffs* who claim that their
23 suits present common questions of law or fact that should be tried together even though they do not seek
24 class certification status.” S. Rep. No. 109-14 (2005) (emphasis added). This action does not fall within
25 this definition because it does not concern numerous named plaintiffs who are electing to try their claims
26 together. CalPERS’ individual beneficiaries have not made any direct claims in this action; rather, the
27 sole plaintiff in this case is CalPERS itself. Accordingly, the Court finds that the removing defendants
28 have not established federal jurisdiction under CAFA.

12 For the foregoing reasons and for good cause shown, the Court hereby GRANTS plaintiff's
13 motion to remand for lack of subject matter jurisdiction, and REMANDS this action to the San
14 Francisco Superior Court. [Docket No. 12]

18 Dated: November 10, 2009

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